Do We Need Amendments to Federal Rule of Civil Procedure 26?

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Abstract

As new technologies emerge and difficulties in the discovery process of electronically stored information rise, the Federal Rules of Civil Procedure fail to provide an ineffective solution. This Article discusses the proposed amendments to the rules of discovery and analyzes whether those amendments will be effective.

Introduction

As laid out by the Cornell University Legal Information Institute, the overall scope of the Federal Rules of Civil Procedure is to "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81," and to ensure the "just, speedy, and inexpensive determination of every action and proceeding."[1] These rules are critical for the functioning of our court system—in terms of keeping all parties focused not on the minutiae of each argument, but on the overall goal of achieving fair and cost-effective solutions to legal problems. The rules are constantly evolving, and it is through a process whereby the bench, bar, and general public are able to contribute by submitting suggestions and comments regarding existing rules and proposed amendments.[2] This keeps them up-to-date and accurate as the

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[1] FED. R. CIV. P. 1.

[2] *See About the Rulemaking Process*, U.S. CTS., http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Apr. 23, 2014); *see also Overview*

legal universe changes and evolves. The purpose of this Article is to discuss a number of amendments that are currently under evaluation at the time of publication.

Proposed Amendment to Rule 26(b)(1)

First, briefly, Rule 26 of the Federal Rules of Civil Procedure deals with duties to disclose and general provisions governing discovery as they relate to parties in court. Rule 26(b) defines the scope and limits of discovery, including limits on frequency and extent of discovery, materials that are discoverable, and so on.[3] The proposed amendment to Rule 26(b)(1) limits the scope of discovery to matters that are "proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties's [sic] resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[4]

Although at first glance this proposed amendment appears to protect parties from unnecessary, costly discovery, a closer examination reveals instead a potential windfall to businesses that have implemented email retention or archiving solutions. With technological advancements, companies can save a great deal of money by updating their email storage or archive systems. The new systems are often cheaper to run and can be operated and maintained by fewer employees. As it affects the upgrade, however, the company must decide whether to migrate (or transfer) their old emails to the new storage or archive system, or leave them archived in some fashion in the outdated system. If the company elects to spend the money and migrate their emails to the new system, the result is that accessing, searching, and producing emails during litigation is likely much more efficient and inexpensive. Companies that

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for the Bench, Bar, and Public, U.S. CTS., http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx (last visited Apr. 23, 2014).

[3] *See generally* FED. R. CIV. P. 26(b).

[4] COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 289 (2013) [hereinafter COMM. REPORT ON PROPOSED AMENDMENTS], http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

elect to save money up-front and not migrate their email will likely incur substantial costs during the discovery process if they need to access, search, or produce these emails during litigation, as the emails will not be easily accessible. Where a court hears a case in which one party demands production of documents from another party who reaped the benefits of a newer, more efficient, and inexpensive email storage or archive system, but saved the expense of migrating its older emails, the court should take this business decision into account in deciding whether to shield the responding party from a now costly production.

In reality, the Rules as they are currently written provide the courts with the ability to protect against such windfalls. This issue arose in *Starbucks Corp. v. ADT Security Services, Inc*.[5] In that case, Starbucks sought to compel the discovery of electronically stored information (ESI) from ADT.[6] From the period of August 2003 through March 2006, ADT archived its ESI on a system it alleged was "so cumbersome . . . that it [was] not 'reasonably accessible because of undue burden or cost.'"[7] Moreover, ADT failed to migrate its ESI stored on this outdated system to its new system, which is much more functional and more readily searchable.[8] Under the current Rules, the court was able to compel discovery.[9] Under the proposed, new Rules, this case may come out differently.

Similarly, as warned by the United States Court of Federal Claims in *AAB Joint Venture v. United States*, "the [c]ourt cannot relieve [d]efendant of its duty to produce . . . documents merely because [d]efendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive."[10] The court similarly stated that, "[t]o permit a party to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results."[11]

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[5] No. 08-cv-900-JCC, 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009) (amended discovery order no. 3).

[6] *Starbucks*, 2009 WL 4730798, at *1.

[7] *Id.* at *2 (quoting FED. R. CIV. P. 26(b)(2)(B)).

[8] *See id*.

[9] *See id*. at *3.

[10] 75 Fed. Cl. 432, 440 (Fed. Cl. 2007).

[11] *AAB Joint Venture*, 75 Fed. Cl. at 443 (citation omitted) (internal quotation marks omitted).

Not only may courts compel discovery when reasonable,[12] but courts may also limit discovery when reasonable. For example, in *Apple Inc.* v. *Samsung Electronics Co.*[13] the United States District Court for the Northern District of California refused to compel production of difficult-to-produce documents after determining that it "is required to limit discovery if 'the burden or expense of the proposed discovery outweighs its likely benefit.' This is the essence of proportionality—an all-to-often ignored discovery principle."[14] On the other hand, if the court determines the producing-party is not fully complying with its discovery requirements, the court may be able to protect moving parties by compelling the responding party to retain an e-discovery vendor.[15]

For these primary reasons, there is no need for this proposed amendment to Rule 26(b)(1), as it is currently presented. If the amendment were modified to account for the cost calculus discussed above, and thus to protect against windfalls, it would have far more use and impact within the courts.

Proposed Amendment to Rule 26(f)(3)(C)

Rule 26 deals with duties to disclose and general provisions governing discovery as they relate to parties in court.[16] Rule 26(f) outlines the conference of the parties regarding responsibilities, timing, and the solidification of a discovery plan.[17] The proposed amendment to Rule 26(f)(3)(C) requires that, beyond the original requirements of a discovery and preservation plan, parties must state their views and proposals on issues relating to the *preservation* of ESI.[18]

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[12] *See* FED. R. CIV. P. 26(b)(2)(B).

[13] No. 12-CV-0630-LHK (PSG), 2013 WL 4426512 (N.D. Cal. Aug. 14, 2013) (order denying motion to compel and motion to enforce).

[14] *Apple*, 2013 WL 4426512, at *3 (footnote omitted) (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)).

[15] *See* Logtale, Ltd. v. IKOR, Inc., No. C-11-05452 CW (DMR), 2013 WL 3967750, at *2-3 (N.D. Cal. July 31, 2013) (order granting plaintiff's motion to compel and awarding sanctions) (putting the non-moving party "on notice that if there are continuing problems with their document productions, the court will order them to retain the services of an e-discovery vendor").

[16] *See* FED. R. CIV. P. 26.

[17] *See* FED. R. CIV. P. 26(f).

[18] *See* COMM. REPORT ON PROPOSED AMENDMENTS, *supra* note 4, at 295, 299.

Requiring parties to complete a preservation plan "as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b),"[19] as required by the proposed amendments to Rule 26(f)(1), would be impracticable. Before parties can develop a preservation plan, it is necessary that they determine which custodians are relevant, which data must be preserved, and in what format. Requiring a preservation plan before that time distracts from the more relevant and pressing tasks of determining the universe of ESI that must be preserved, the software and hardware from which it has to be collected, and the form in which the company is currently storing ESI (if any).

For the above reason, the proposed amendment is unhelpful and unrealistic. If, however, the Committee adopts this amendment as proposed, an explanatory comment should be included to address this real-world issue.

Proposed Amendment to Rule 26(f)(3)(D)

The proposed amendment to Rule 26(f)(3)(D) limits the parties' discussion about claims of privileges and protection for documents to those that would be included in a court order under Federal Rule of Evidence 502, which deals with attorney-client privilege and work product.[20]

This limitation forecloses discussions of protection that do not fall under Federal Rule of Evidence 502—for example, protective orders for private information, such as social security numbers found on bank documents. Although there is no clear benefit to limiting the discovery plan to protection of information that falls under attorney-client privilege or work product doctrine, the cost of such an action is to foreclose necessary discussions of other valid data-protection concerns.

The proposed amendment to Rule 26(f)(3)(D) is also unhelpful and unrealistic. Should the Committee adopt it, an explanatory comment is needed to resolve this limitation on discovery.

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[19] FED. R. CIV. P. 26(f)(1).

[20] *See* COMM. REPORT ON PROPOSED AMENDMENTS, *supra* note 4, at 296.

Proposed Amendments to Rule 37(e)

Rule 37 deals with failures to make disclosures during discovery, failures to cooperate during discovery, and subsequent sanctions.[21] Rule 37(e) currently states that "[a]bsent exceptional circumstances, a court may not impose sanctions . . . on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[22] The proposed amendments to Rule 37(e) will limit adverse inferences and sanctions for the spoliation of evidence to circumstances in which the moving party can show that the responding party's acts to destroy evidence "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[23]

These proposed amendments raises the question: how can the moving party prove the benefit or necessity of missing information? As Judge Scheindlin of the United States District Court for the Southern District of New York so eloquently expressed in her opinion in *Sekisui American Corp. v. Hart*,

> [t]o shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it "would allow parties who have destroyed evidence to profit from that destruction."[24]

In *Sekisui*, the plaintiff corporation destroyed the ESI of at least two custodians, one of whom was the defendant-former-employee in the action.[25] In *Sekisui*, "[i]t [was] impossible to say how many emails were permanently deleted and remain unrecoverable."[26] Though the plaintiff

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[21] *See* FED. R. CIV. P. 37.

[22] *Id.*

[23] COMM. REPORT ON PROPOSED AMENDMENTS, *supra* note 4, at 314-15.

[24] 945 F. Supp. 2d 494, 509 (S.D.N.Y. 2013) (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002)).

[25] *See Sekisui*, 945 F. Supp. 2d. at 499-500.

[26] *Id.* at 500.

corporation argued that "the missing emails would be of only marginal relevance in th[e] action," there is no way for the defendant-former-employee to counter such argument without knowing the contents of the deleted ESI.[27] As the court noted, so long as relevant evidence was destroyed with a culpable state of mind, which requires only that the "evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently," the burden to prove prejudice of that destruction should rest with the culpable party.[28]

Importantly, counsel must now advise their clients that destroying evidence is risky, as the burden is on the destroying party to prove good faith. As it stands now, "each party [bears] the risk of its own negligence."[29] If the burden shifts to the innocent party to show prejudice or harm, some potential spoliators may be less fearful of deleting evidence as the burden would be on the innocent party to prove its contents.[30] Imagine the party who stumbles upon very harmful evidence, but destroys it knowing that the opposing party could never prove the value of its contents. The amended Rule inadvertently protects this bad actor.

In sum, amending Rule 37(e) to shift the burden of proof to the innocent party is problematic. The Committee has yet to explain or proffer a reason why these amendments are beneficial or necessary.

Conclusion

Overall, these amendments do not seem to be of significance in their present form. With additional comments and explanation, they could be useful to the bench and bar in refining the understanding of the above Federal Rules.

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[27] *Id.* at 501.

[28] *Id.* at 502-03 (alteration in original) (quoting *Residential Funding*, 306 F.3d at 108) (internal quotation marks omitted).

[29] *Id.* at 503 (quoting *Residential Funding*, 306 F.3d at 108).

[30] *Cf. id.* (quoting *Residential Funding*, 306 F.3d at 108) ("[T]he adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.").